

National Hydropower Association

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October 31, 2001

James Connaughton
Chairman
Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503

Re: Comments of the National Hydropower Association to the Interagency Energy Task Force Concerning Executive Order 13212

Dear Chairman Connaughton:

On May 18, President Bush issued Executive Order 13212, which established an interagency task force to ensure that federal agencies coordinate their efforts on permitting of energy projects. You have requested specific suggestions regarding how permitting and other regulatory decision making processes may be improved or streamlined.¹ The National Hydropower Association (NHA)² appreciates the President's initiative and the opportunity to comment about the potential impacts of this important effort.

The National Energy Policy Development Group observed in its National Energy Policy that regulatory uncertainty in the hydroelectric licensing process is "the most significant challenge confronting hydropower." The issue is timely and significant. Over the next 15 years, about half of all non-federal hydroelectric capacity – more than 29,000 megawatts of power – must go through the relicensing process in order to continue operating.

Although the process is supervised by the Federal Energy Regulatory Commission ("FERC"), which has central licensing authority under the Federal Power Act ("FPA"), it involves a host of other federal and state resource agencies with overlapping and sometimes conflicting interests and responsibilities. The process is lengthy and complicated, and does not always produce results that balance environmental benefits with the interests of consumers and the public in domestic, renewable, emission-free electric generation resources. As a result, a significant amount of existing clean, emissions-free, domestic renewable energy supply is at risk if improvements to the relicensing process are not soon made.

Although numerous federal agencies play a role in the relicensing process, the focus of these comments is on the role of three key agencies: the Department of the Interior, the Department of

¹ 66 Fed. Reg. 43586 (August 20, 2001).

² NHA is the national trade association committed exclusively to representing the interests of the hydroelectric power industry. Our members represent 60% of domestic, non-federal hydroelectric capacity and nearly 80,000 megawatts overall. Its membership consists of more than 120 companies including public utilities, investor owned utilities, independent power producers, equipment manufacturers, engineers, consultants and law firms.

Commerce, and the Department of Agriculture (through the Forest Service) (collectively, "Departments"). Agriculture and Interior set mandatory conditions on FERC-issued licenses under Section 4(e) of the FPA for projects on federal lands. Commerce and Interior have the authority to mandate fishways under Section 18 of the FPA. FERC is required to consult with Interior and Commerce under Section 7 of the Endangered Species Act ("ESA"), and as a policy matter, generally defers to them regarding license requirements for species protection. Below are six suggestions for actions these agencies can take to improve the relicensing process.

1. **Support the hydro industry's legislative proposals for reform of the licensing process.** The hydroelectric industry for several years has been seeking moderate reforms of the licensing process, in particular reforms to the Departments' mandatory conditioning authorities under Sections 4(e) and 18. These reforms would not overturn or impair mandatory conditioning authority in any way or "roll back" existing environmental law. Rather, they would make various improvements in the Departments' administering of that authority to require greater consideration of impacts of mandatory conditions on electric generation and reliability, and to require consideration of cost-effective alternatives to achieving agency resource objectives. The proposals would also promote a streamlined and cooperative environmental review by FERC and the Departments under the National Environmental Policy Act ("NEPA"). We ask that this Administration, which has voiced strong support for hydropower and highlighted relicensing reform in the National Energy Policy, support such moderate changes and work with Congress to achieve substantive reform in the 107th Congress.
2. **Rescind the Proposed Interagency Policy on the Prescription of Fishways Under Section 18 of the Federal Power Act issued December 22, 2000.** In the waning hours of the Clinton Administration, Interior and Commerce issued a joint proposed policy on fishway prescriptions under Section 18 of the FPA. Despite extensive hydro industry criticism and adverse national press (*see* 3/13/01 *Washington Post*, p. E1 and attached letter to you from NHA asking the Task Force to rescind the policy), Interior and Commerce have not yet withdrawn this proposed policy. Among many other problems, the proposed policy would greatly overreach the agencies' prescriptive authority under Section 18 by defining "fish" to include virtually every form of water-related animal life (insects, mollusks, amphibians, etc.) other than mammals and birds, and by defining "fishway" to include all aspects of a hydro dam and its operations. Interior and Commerce should cooperate and consult with FERC, in the event FERC initiates a rulemaking pursuant to Section 1701(b) of the Energy Policy Act of 1992 to clarify the Section 18 fishways authority. The proposed policy could literally cost the hydropower industry billions of dollars and is entirely inconsistent with the hydropower recommendations laid out in the President's National Energy Policy.
3. **Establish a meaningful administrative appeals process for mandatory conditions.** Also in the last hours of the Clinton Administration, Interior and Commerce issued a joint policy on administrative review of mandatory conditions under Sections 4(e) and 18. The joint policy rejected suggestions that Interior and Commerce utilize "equal consideration and public interest standards" in developing mandatory conditions. Despite agency intention to "improve" the hydro licensing process, the new policy fails to define substantive standards for review of mandatory conditions and to detail procedures for the development of an administrative record to help avoid the need for costly and protracted court appeals, which is the only recourse currently available to licensees and other parties dissatisfied with mandatory conditions. While the proposal does represent a good faith effort to improve the

process within the confines of current law, it does not resolve industry's concerns and it fails to address the fundamental problems with the process. Interior and Commerce should develop proposed regulations for public comment that set both substantive standards for mandatory conditions and establish a meaningful opportunity for administrative appeal.

4. **Base mandatory conditions on sound science and consider the economic impacts of conditions.** Even without legislative reform, we believe the Departments have considerable discretion, if not an obligation, to take into account impacts on electric generation and reliability and other economic values when setting mandatory conditions. Decisions also should be based on the best available data and scientific analysis, to ensure that licensee and ratepayer resources are spent in achieving meaningful environmental benefits. The Departments should adopt express policies and rules for consideration of economic impacts and for basing decisions on sound science.
5. **Comply with the Commission's regulations for timing of mandatory conditions.** The Commission's regulations (18 C.F.R. 4.34) currently provide for the filing of agency mandatory conditions within a certain time, which is more than adequate, after a license application is complete and all environmental studies are done. If the agency nonetheless believes it has insufficient information to set its conditions at that time, it can provide preliminary conditions. Within a fixed time period after the Commission staff has issued its draft NEPA document, the agencies must file their final conditions, which can depart from the preliminary conditions to the extent there is new information in the draft NEPA document. Failure to meet these deadlines can result in waiver of the agencies' mandatory conditioning authority under the rules.

The Departments, however, frequently ignore the deadlines and have questioned the Commission's statutory authority to impose them. There are good reasons for the deadlines. First, failure to comply with the deadlines results in unnecessary delay of the relicensing process. Second, the Commission staff needs to have the agency final conditions in order to perform its public interest balancing of all terms and conditions in the recommendations it makes to the Commission. When the Departments withhold their conditions, Commission staff must make its recommendations based on incomplete information. Further, it is not unusual for the Departments to "ratchet up" their environmental requirements in the final conditions, which often are not submitted until the eleventh hour, after Commission staff has completed its final NEPA document. This results in a "piling on" effect of costly environmental conditions. Commission staff does not have or take the opportunity to revisit the balance it originally struck. The Departments could solve this problem by agreeing as a matter of rule or policy to comply with the Commission's regulations on timing and deadlines. (Of course, the Commission also could help alleviate this problem by directing its staff to revisit and rebalance its license recommendations based on late-filed mandatory conditions.)

6. **Consult and cooperate with FERC in setting mandatory conditions.** The Commission consults with the Departments under Section 10(j) of the FPA, the Fish and Wildlife Coordination Act, the Endangered Species Act, and numerous other statutes. The Departments, however, have not typically sought or considered the Commission's views when setting their mandatory conditions. As the agency with overall licensing responsibility and the mandate to balance environmental and economic factors in the public interest, the

Commission's views should be important in informing the Departments' decisions. The Departments should adopt rules or policies providing for consultation with the Commission.

We again appreciate the opportunity to comment on these important issues and hope the Task Force will pursue our recommendations. Additionally, we would be pleased to meet with you or provide further information. Please do not hesitate to contact Mark R. Stover, NHA's Director of Government Affairs, or myself, at 202-682-1700, regarding these matters.

Sincerely,

A handwritten signature in cursive script, reading "Linda Church Ciocci".

Linda Church Ciocci
Executive Director
National Hydropower Association

Attachment